

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(Oakland, CA)

VICTOR MOULDING COMPANY

Employer

and

Case 32-RD-1328

DAVID R. BORELIZ, An Individual

Petitioner

and

TEAMSTERS LOCAL 853, affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

¹ The parties stipulated, and I find, that the Employer is a California corporation with an office and place of business in Oakland, California, where it is engaged in business in the processing and distribution of picture framing products and materials. During the past twelve month period, the Employer in the course and

3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

INCLUDED: All fulltime and regular part-time production and warehouse employees employed by the Employer at its facility located at 977 66th Avenue, Oakland, California 94621.

EXCLUDED: All other employees, office employees, sales employees, technical employees, professional employees, guards, and supervisors² as defined in the Act.

conduct of its business operations, purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California.

² The only issue in this proceeding concerns the alleged supervisory status of the RD Petitioner David R. Boreliz, herein called Boreliz. The Union contends that Boreliz is a supervisor within the meaning of Section 2(11) of the Act and that, accordingly, the petition herein should be dismissed. On the other hand, both the Employer and Boreliz assert that Boreliz is not now, nor has he ever been, a statutory supervisor, and consequently an election should be directed based on the RD petition filed by Boreliz. The case cited by the Union at the hearing, *Modern Hard Chrome Service Company*, 124 NLRB 1235 (1959), stands for the proposition that the supervisory status of the petitioner in a decertification proceeding, and the possible dismissal of the petition if the individual is found to be a supervisor, can be considered at the hearing. As set forth below, Boreliz' status was litigated at the hearing and is determined herein.

The Employer is engaged in the distribution of picture framing supplies, consisting of mouldings, mat board, and hardware, out of a warehouse located in Oakland, California. No production is engaged in by the Employer. Rather, they are solely engaged in the wholesale distribution of picture framing components. The warehouse employees who have been represented by the Union for many years, and who are covered by a current collective bargaining agreement which the parties have stipulated is not a bar to this proceeding, fill the orders received

by the Employer by pulling the items ordered from storage in the warehouse, package the orders, and then ship them by freight or by United Parcel Service. Most of the employees work as general warehouse workers wherever needed. However, a few of them have more or less regular assignments. Boreliz, for instance, regularly works as a shipper and is engaged in preparing the orders for shipment by freight or by UPS, working at tables set up for each respective mode of shipment. There are two other employees who assist in shipping in addition to other duties. Mike Pavia, the shop steward, spends most of his time packing moulding shipments. The warehouse is roughly divided into four sections. About one half of the warehouse is devoted to the storage of mouldings. The rest of the warehouse is divided into separate sections for the storage of mat board and hardware, respectively, and the area where orders are prepared for shipping and where supplies are received.

Lyle Robles, has been employed as Distribution Manager since May 5, 1995, for the Oakland facility as well as for facilities located in Anaheim, California, Portland, Oregon, and Chicago, Illinois, none of which are involved in this proceeding. He maintains his office in a trailer which is stationed inside the warehouse alongside one of the walls. The only other person stationed in the trailer is Bob Williams, the Employer's computer person, who is not in the bargaining unit. Robles reports to Susan Bell, the president of the company, who is located in the front office portion of the building. Robles spends most of his time at the Oakland facility, and travels to each of the other facilities only approximately one time per year, respectively.

There were no supervisors in the warehouse until Robles hired Beverly McElhare and Carey Magill to serve as warehouse supervisors whom the parties stipulated, and I find, are supervisors within the meaning of Section 2(11) of the Act. Prior to the hiring of McElhare and Magill Robles used a series of leadmen, the last of whom was Boreliz, all of whom were in the bargaining unit represented by the Union. According to Robles, the leadmen were used solely to relay work assignments from him to the warehouse employees. There is no evidence that any independent judgment was utilized by the leadmen in relaying job assignments from Robles to their fellow warehouse employees. There is a dispute as to whether Boreliz ceased being a leadman after the hiring of McElhare and Magill. While it appears that on those rare occasions when the two supervisors are away from the plant at the same time (according to Robles they have not taken any vacation time since they were hired), Boreliz, who, with one other employee, is at the highest warehouse employee rate of \$14.00 per hour, answers the warehouse phone and may take calls from employees calling in sick. (Employees also call the front office). In addition, Mike Pavia, the shop steward, testified that he observed Boreliz going into the trailer where Robles is stationed on a regular basis and that he has been told that Boreliz assigns work to warehouse employees about six times a year. While Boreliz testified that he goes into the trailer to talk to Robles, he stated that it was to discuss work related matters concerning his own work or to engage in social conversation. Pavia has

his own regular assignment packing moulding so is not given work assignments as are the general warehouse workers. Even assuming that Boreliz has sporadically given out work assignments, there is no evidence that he exercised any independent judgment in doing so. On those occasions when the two supervisors, who are married to each other, are both gone, employees may tell Boreliz that they want to leave early. However, there is no evidence that Boreliz does anything more than acknowledge the statement by the employee that he or she is leaving work early. Robles would almost invariably be present if McElhare and Magill were absent at the same time. Robles never notified the warehouse employees that Boreliz was no longer a leadman when the two supervisors were hired. Although the Union and the shop steward assert that Boreliz is still the leadman, both Robles and Boreliz testified that Boreliz' status as leadman terminated with the hiring of the two supervisors in October 1996.

Boreliz, whom the Union contends is a leadman with supervisory authority, makes the same hourly rate as each of the two acknowledged supervisors. Boreliz has worked for the employer for 16 years. One other warehouse employee, Ronald Tjon, receives a \$14.00 per hour rate of pay, and six other employees receive hourly rates in the \$13.00 range, including Pavia, the shop steward, who is paid \$13.50 per hour. There is presently only one shift in operation at the warehouse, 8:00 a.m. to 4:30 p.m. The two supervisors, McElhare and Magill, as well as all warehouse employees, including Boreliz, work the same hours. Robles holds a meeting each morning with McElhare and Magill to go over the day's work assignments. Boreliz does not attend that meeting.

At the hearing there was a great deal of testimony concerning the parking spot utilized by Boreliz for his privately owned vehicle. A certain area in the yard is reserved for the female office employees. When one of those employees no longer had an operable vehicle, Boreliz requested and was granted permission to use one of the spaces, but only so long as the office employee did not have a vehicle to drive to work.

In deciding whether Boreliz is an employee or a statutory supervisor, I note first of all that the burden in establishing his supervisory status is on the party asserting such status, i.e. the Union in this proceeding. *Dickinson Iron*, 283 NLRB 1029, 1034 (1987). Secondly, and most importantly in a proceeding where a finding of supervisory status would lead to the dismissal of the RD petition, in making determinations regarding supervisory status, "the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Westinghouse Electric Corporation v. NLRB*, 424 F.2d 11541, 1158 (7th Cir. 1970, cert. Denied 400 U.S. 831).

Section 2(11) of the Act defines a supervisor as one who possesses "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote,

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.³ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including

discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

While it is clear that the possession of any of the authorities listed in Section 2(11) of the Act, makes that individual a supervisor, *Queen Mary*, 317 NLRB 1303 (1995), it is clear that Boreliz does not now, nor did he when he was considered to be a leadman, possess any of the authorities enumerated in Section 2(11) of the Act. Prior to hiring McElhare and Magill, Robles was in direct charge of the warehouse employees and used leadmen, of whom Boreliz was the third, the first two having quit, to relay work assignments of Robles' own making to employees. Clearly, no independent judgment was required by Boreliz to relay Robles' instructions. As to the period of time since the two acknowledged supervisors were hired, any lead type activities on the part of Boreliz have been sporadic at best. While there is absolutely no evidence that the sporadic lead type of activities on the part of Boreliz in recent years demonstrated the use of independent judgment in managing employees, even assuming, for the sake of argument, that those activities were supervisory in nature, they were too sporadic to serve as a basis for making Boreliz a supervisor. See, *Commercial Fleet Wash*, 190 NLRB 326 (1971); see also, *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127 (1971).

No significance is placed on Boreliz' utilization of a parking spot reserved for non-supervisory female office employees. First of all, he was granted permission to use that space on a temporary basis only so long as one of the office employees did not have a car. Second of all, it is difficult, if not impossible, to see how Boreliz' utilization of that space in a situation where all employees are permitted to park on the premises, somehow makes Boreliz a supervisor.

Based on the above and record as a whole, I conclude that Boreliz is not a supervisor within the meaning of Section 2(11) of the Act and I shall include him in the unit found appropriate herein. Further, since Boreliz, the Petitioner, is not a statutory supervisor, I shall direct an election herein.

There are approximately 21 employees in the unit.

³ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by, **TEAMSTERS LOCAL 853, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care 359 Facility*, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before, February 16, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by February 22, 1999.

Dated at Oakland, California this 8th day of February, 1999.

/s/ James S. Scott

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

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177-8520-4700
177-8520-6200